No. 472.

IN THE

United States Circuit Court of Appeals

OF THE

NINTH CIRCUIT

HERMAN CRAMER,

Plaintiff in Error,

VS.

THE SINGER MANUFACTURING COMPANY, (a corporation)

Defendant in Error.

PETITION FOR REHEARING

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Petition for Rehearing.

Comes now the Singer Manufacturing Company, defendant in error above-named, and prays this Honorable Court to reconsider its decision hitherto rendered herein, and to grant a rehearing of said cause, upon the following grounds:

That in its decision reversing the judgment of the Circuit Court this Court erred in holding that

the active defense of *Cramer* v. *Fry* by the Singer Manufacturing Company was not openly conducted by the latter with the full knowledge of the plaintiff, Cramer.

That this Court also erred in its said decision in holding that the estoppel contended for by this defendant in error was not mutual in its operation, and that the Singer Manufacturing Company would not have been bound by a judgment in favor of the plaintiff if such a judgment had been rendered in *Cramer* v. *Fry*.

That this Court also erred in holding substantially that the fact that the Singer Manufacturing Company availed itself of its right to cause the action to be dismissed as to itself, in *Cramer* v. *Fry*, prevents it from now pleading the judgment in *Cramer* v. *Fry* as a bar to the present action against it, notwithstanding its open assumption of the burden of defense in *Cramer* v. *Fry*.

The Pleadings in the Fry Case show that the Singer Company was the Real Defendant.

When the original declaration was filed in *Cramer* v. *The Singer Manufacturing Company*

and Willis B. Fry, No. 11,808, Fry was made a party defendant *for the sole and only purpose of reaching, indirectly if need be, the Singer Company*. This was thoroughly understood at the time by all concerned. The first paragraph of said original declaration was and is as follows:

"That the defendant, the Singer Manufactur-
"ing Company, is and at all the times herein-
"after mentioned was a corporation organized
"and existing under the laws of the State of
"New Jersey, and is and at all times herein
"mentioned was engaged in the business of
"manufacturing sewing machines, and selling the
"same throughout the United States That as a
"part of its said business it maintains and con-
"ducts and at all times herein mentioned has main-
"tained and conducted a branch establishment
"for selling and trading in sewing machines at
"the City and County of San Francisco, State of
"California, and in the Northern District thereof,
"and in connection with its said business it has
"and had at all said times a managing agent in
"said State and District of California, as plaintiff
"is informed and so believes the truth to be."

Fry was described as such managing agent, *without any averment whatever that he had any pecuniary interest in the alleged infringements by*

the Singer Company. It was the manufacture and sale of machines *by the New Jersey corporation* which was sought to be reached by the plaintiff, and Fry was served with process as the managing agent in California of the corporation, and was also himself made a party defendant because it was well understood that, in view of *Shaw* v. *Mining Co.*, *145* U. S. 444, and other cases, an action against the New Jersey corporation alone could not be maintained in the California district. Fry was made a defendant because it was obvious that his company would necessarily assume the burden of defending the action, either as a party submitting to the jurisdiction or as a principal voluntarily assuming the defense of its agent.

The individual answer in the Fry case of the defendant, Willis B. Fry, filed in that case, shows clearly the business and occupation of the Singer Manufacturing Company, and that company's interest in the litigation, and Fry's relation to the company as follows (record, pages 63-65):

" Further answering defendant avers that dur-
" ing more than twelve years last past, the
" Singer Manufacturing Company, which is a
" corporation created and existing under and by
" virtue of the laws of the State of New
" Jersey, and which has its principal place of

"business in the said State of New Jersey, has "been carrying on the business of manufact-"uring and using and selling sewing-machines "of a particular kind, which have been known "in the markets of the world as Singer Sewing "Machines. That the said corporation, the "Singer Manufacturing Company, has been "doing a very large business during all of said "years, and has manufactured and sold during "said time a large proportion of all the sewing-"machines that have been manufactured in the "whole world.

"That during more than twelve years last past "the said corporation, the Singer Manufacturing "Company, has had and maintained a place of "business in the city of San Francisco, in said "Northern District of California, where it has "carried on a local business in selling the said "Singer sewing-machines, and which machines "it has sent from its factory in New Jersey to "said city of San Francisco for that purpose. "Defendant further avers that in carrying on its "said business of selling said sewing-machines, "the said corporation, the Singer Manufacturing "Company, has employed this defendant to act "as its employee in making sales of said sewing-"machines, and in attending to said local busi-"ness in said city of San Francisco, and this

" defendant has acted as the employee of said
" corporation, the Singer Manufacturing Com-
" pany, in repairing, and using so far as it was
" necessary to use them for testing their condi-
" tion, and in selling the said sewing-machines,
" and has done whatever was necessary in and
" about the carrying on of said local business in
" the city of San Francisco, as the employee of
" said corporation, the Singer Manufacturing
" Company, and in no other way or manner
" whatever. That he has neither made nor used
" nor repaired, nor sold any sewing-machines or
" sewing-machine treadles in his own right, nor
" in his own name, but that all the making,
" repairing, using, and selling of sewing-
" machines or sewing-machine treadles that has
" been done by this defendant, and which is
" claimed to constitute any infringement of said
" letters patent, has been the making or repair-
" ing or using or selling done and performed by
" the said corporation, the Singer Manufacturing
" Company, by and through this defendant, as
" its employee, and in no other way. That this
" defendant has not, at any time, been the owner
" of any sewing-machines or treadles, and has
" not, at any time, either made or used or
" repaired or sold any sewing-machines or
" sewing-machine treadles, or sewing-machine
" apparatus, or sewing-machine attachments of

" any nature or kind, otherwise than as employee
" as aforesaid, or otherwise than as such acts
" were the acts of said corporation, the Singer
" Manufacturing Company.

" Further answering defendant avers that if
" the plaintiff herein has any cause of action aris-
" ing out of the sale of said or any sewing-
" machine treadles by defendant, the said cause
" of action exists against said corporation, the
" Singer Manufacturing Company, and not
" against defendant, and that the defendant is
" not a necessary nor proper party to this action.

" Defendant further avers that this Court has
" no jurisdiction whatever over the said corpora-
" tion, the Singer Manufacturing Company, and
" that this action has been brought against
" defendant because the plaintiff could not main-
" tain an action in said district against said
" corporation, and has been brought for the pur-
" pose of vexing and annoying the said corpora-
" tion, and not because plaintiff has any cause of
" action whatever against this defendant."

The Statements of Plaintiff's Attorney in the Fry Case show that a Judgment was sought to reach the Singer Co.

In the Fry case, Mr. Jno. L. Boone was originally the plaintiff's attorney. The reporter's

transcript of the testimony and proceedings in that case contains Mr. Boone's opening address to the jury. This transcript Judge Beatty had the undoubted right to examine, in determining the question of *res adjudicata* in this case. From page 9 of said transcript we quote, as follows, the language of Mr. Boone (the italics being our own):

" We will show you, gentlemen of the jury, that " after Mr. Cramer got his patent, he wrote to " the Singer Machine Company, in New York, " sent them a copy of his patent, called their at- " tention to it, told them its benefits and advan- " tages, and that they wrote to him and told him " they did not want to have anything to do with " it, that they did not want it. But *we will show* " *you thct they immediately turned around and* " *made the same thing, appropriated the benefit* " *of the invention, used the invention as it is* " *patented, but attempted to evade or* THEY " WILL CLAIM *that they evaded the use of the* " *patent* by using some other kind of a bearing " than the knife-edge bearing."

Can anything be plainer than that, when plaintiff used the above language—" THEY WILL CLAIM "—with reference tb the Singer Company, that he recognized that company as being present and defending the action ?

Mr. Boone further said, quoting from pages 9 and 10 of the transcript:

"So far as the question of damages is con-
"cerned, we will say to you now, before we enter
"into this case, that *we are not going to ask any*
"*damages particularly from Mr. Fry. Mr.*
"*Fry is simply an agent of the sewing machine*
"*company, and we shall waive damages*, although
"we have asked for twenty thousand dollars
"damages in our complaint."

This opening statement by the counsel was followed up by the plaintiff's testimony, detailing at length his attempt to sell his invention to the Singer Company, and his correspondence with the Singer Company, and in fact all the injury which he conceived to have been inflicted upon him by the Singer Company.

The testimony of Mr. Fry in the Fry case comprises forty pages of the reporter's transcript, *and relates entirely and solely to his connection with the Singer Company, and the construction of the Singer Company's alleged infringing machine.*

Nothing was more open or apparent, in all the proceedings of *Cramer* v. *Fry*, and especially during the actual trial, than that the Singer Com-

pany was the real defendant in interest, and was assuming the entire burden of the defense; and no one knew this better than the plaintiff and his attorneys. After the dismissal as to the Singer Company Fry was the only *nominal* defendant. But the acts of the Singer Company, in the manufacture and sale of sewing machines under the Diehl patent, *were the only acts of alleged infringement concerning which the plaintiff's proofs were taken*, and the Court was asked by plaintiff's attorneys, as the records of *Cramer* v. *Fry* show, to instruct the jury substantially that the ownership of the Diehl patent gave *the Singer Company* no right to use the plaintiff's invention.

It was an open, patent, obvious, and conceded fact, from the filing of said original declaration, throughout the trial, to the final judgment in *Cramer* v. *Fry*, that the Singer Company, the real object of the plaintiff's attack, was actively, solely and openly bearing the entire burden of the defense. This had never been questioned—nobody had ever thought of questioning it—down to the time of trial of the present action of *Cramer* v. *The Singer Manufacturing Company*.

It would seem from the quotations hereinbefore made from the pleadings and transcript

in the Fry case that nothing could be more clear than the fact that the Singer Company was admittedly back of their agent or employee in the fight. When testimony upon this point was offered in the case at bar, the first objection made by plaintiff's counsel appears upon page 71 of the record, where his sole reason for the objection was based upon the fact that the Singer Company, having once been a party defendant in the Fry case and having challenged the jurisdiction of the court, it made no difference whatever "what relationship the Singer Manufactur-
"ing Company bore to Fry in that case, inasmuch
"as they had already successfully challenged the
"jurisdiction of the court, and could not be
"bound by anything that might occur in that
"case."

It seems to us that the fact that the Fry suit was originally brought against the Singer Manufacturing Company in the Northern District of California, when plaintiff's counsel certainly knew that it was wrongfully brought, and that there was no jurisdiction whatever over the Singer Company, and that it would be therefore dismissed, is a matter that should have weight in our favor instead of against us. The Cramer-Singer-Fry suit was brought while the act of March 3d, 1887, was in force, and that act dis-

tinctly provided that "*no civil suit shall be* "*brought before either of said Courts* against " any person by any original process or proceed- " ing in any other district than that whereof he " is an inhabitant,"—all of the earlier decisions under this act holding that neither a plea nor a demurrer was necessary to obtain an order of dismissal as to such suit wrongfully brought against the party, but that it was sufficient to simply call the attention of the court to the fact, as disclosed by the proceedings, and move to dismiss.

Miller-Magee Co., v. *Carpenter*, 34 Fed. Rep. 433.

Reinstadler v. *Reeves*, 33 Fed. Rep. 308.

Gormully Co. v. *Pope Co.*, 34 Fed. Rep. 818.

Filli v. *Railroad Co.*, 37 Fed. Rep. 65.

Booth v. *St. Louis Co.*, 40 Fed. Rep. 1.

After Waving Damages against Fry, there was nothing left for the Plaintiff to get but a Judgment which he could use against the Singer Company.

The original suit having been dismissed as to the Singer Company and continued as to Fry,

and the plaintiff having waived all damages at the commencement of the trial, there was nothing at issue in the case whatever, either as a matter of fact or as a matter of law, excepting the question of the validity of of the Cramer patent and the question of infringement. It is perfectly evident that when the plaintiff waived the whole matter of damages as against the defendant, Fry, the latter had no further interest in the litigation whatever of any kind or description. It made no possible difference to him personally whether the Cramer patent was valid or whether a machine manufactured by the Singer Company infringed such patent. It is evident that as to both of these matters the Singer Company was vitally interested. The suit had been dismissed without prejudice as against that company, but a judgment holding the Cramer patent to be valid and holding the machine that was manufactured by that company to be an infringement of the patent. would be a matter of most controlling and vital importance. The only judgment which the plaintiff hoped to obtain, after waiving all claim to damages, was a judgment which he could use only against the Singer Company. Under these circumstances, what happened? All of the counsel Eastern and Western, employed by the Singer Manufacturing Company originally, re-

tained their connection with the case. All of the record defenses in the shape of testimony, models and exhibits, comprising depositions of a large number of witnesses, including a widely known expert in sewing-machine matters in New York City, Mr. Henry L. Brevoort, were all taken, argued and prepared by the long-known counsel for the Singer Manufacturing Company. The company's Eastern counsel made the journey to San Francisco to conduct the trial of the case. Every party having anything to do with that case knew this fact as well as if it had been placarded on the walls of the courtroom or shouted in the ears of the plaintiff's counsel at the time of the trial. The whole basis of the prosecution of the action was the knowledge upon the part of plaintiff's counsel that the Singer Company was back of the defendant, and would be bound by the ruling of the court or the verdict of the jury upon the questions at issue as to the validity of the Cramer patent and as to infringement by the Singer Company's Diehl machine.

What earthly interest had the plaintiff, Cramer, in that action, or the defendant, Fry, after the matter of damages had been waived by the plaintiff, except such interest as arose out of the fact that the Singer Company was making the defense in the case, and that the verdict or finding

would be a verdict or finding which that company would thereafter be estopped from questioning or controverting? No human being could "look over the old case" as Judge Beatty says he did (record, page 77), without seeing in the clearest and fullest possible manner that the only judgment which the plaintiff attempted to obtain was a judgment which might thereafter be used against the Singer Company. We respectfully ask how or in what manner the defendant, Fry, or his counsel, could have more effectively convinced the court or plaintiff's counsel that the Singer Company, and the Singer Company only, was back of that fight, than by the course they took and the conditions they presented in that litigation? Can any one suppose for a moment that the plaintiff would have brought and pressed to its conclusion a suit against an employee or hired man of the Singer Company, at the same time waiving all claim for damages, unless he knew that the Singer Company would back the defendant in the fight, and that he would thereby obtain an ultimate advantage over that company?

Supposing the judgment in the Fry case had been in favor of Cramer, and Cramer had proceeded immediately to file his bill in equity against the Singer Company, alleging an infringement of the Cramer patent and praying for an

injunction, accounting and reference to the master, etc., in the United States Circuit Court for the District of New Jersey (the only place where, under the law as it then stood, there was any right to bring such suit); and supposing in such bill Cramer had set up the admitted facts as they appear in this case, to-wit: the appearance of counsel for the Singer Company in the California Court; the continuance of such counsel as to the employee, Fry; the taking of the great mass of testimony, expert and documentary, the examination of witnesses, the production of models, exhibits, etc., by the long-known counsel for the Singer Company;—is there even a shadow of doubt that the New Jersey Court would have held, under the decisions cited in our briefs on file, that such facts were open and notorious, and that no other conclusion could be drawn from them than that the Singer Company was back of the defense and was the only party who had any interest whatever in the result?

When these admitted facts are supplemented by the further proven facts that the Singer Company *actually, as a matter of fact*, paid all of the expenses of the trial of every kind and descrip tion, court, counsel, witness, expert and model fees, can there be any doubt at all that the New Jersey Court would have held that the real defen-

dant was the Singer Company, that there was privity between the employee defendant and the company, and that the company was estopped and bound by the finding in the California Court? It seems to us to be perfectly obvious that it was as open and notorious, both to the Court and the plaintiff and the plaintiff's counsel, that the Singer Company was back of and defending its employee in the Cramer-Fry litigation, as it would have been if there had been on file a detailed statement and open exposition of all the facts and details relating to the conduct of such defense.

In the extended litigation which was carried on in the Circuit Court here against the Singer Company by Andrew Brill, and which went to this Circuit Court of Appeals and to the United States Supreme Court, the defendant Fry bore the same relation to the case that he does to this case, and the Singer Company defended by and through the same identical counsel. These facts are matters of record, and the reported opinions show them to be facts. Nothing has been more notorious in the litigation of the Federal Courts of this circuit, or better known to the plaintiff's experienced attorneys, than that the defense of the Cramer case has been made by the same company and by the same counsel who defended the Brill case.

The Cramer-Fry Judgment was conclusive upon both Cramer and the Singer Company.

The estoppel had all the elements of mutuality. The trial court said (record p 84):

"*I should not have a moment's hesitation, if*
"*that former action had gone against the de-*
"*fendant, in now saying that it was res adjudi-*
"*cata as to this defendant in this suit, and they*
"*would be bound by it. I do not know any reason*
"*why the same rule should not apply here, and*
"*that it should have the benefit of it.*"

It seems to us perfectly clear that if the plaintiff had prevailed in *Cramer* v. *Fry*, and the sewing machines manufactured and sold by the Singer Company under the Diehl patent had been adjudged to infringe the Cramer patent, and Cramer had afterwards sued the Singer Company, and in his declaration had averred *the very same facts* as to the Singer Company's acts, which the Singer Company has averred in its answer in this case, the Singer Company would have been held to be estopped to deny the conclusiveness of the finding that machines made under the Diehl patent were infringements of the Cramer patent,—no appeal having been taken from the original judgment. If the positions of

the parties were thus reversed, and Cramer was seeking to avail himself of the estoppel, he could and would plead against the company the *very same facts* which the company has pleaded against him, and the Singer Company could not deny them. The Singer Company, under such circumstances, would surely have had invoked against it the doctrine as announced by Judge Blodgett in *Eagle Co.* v. *Moline Co.*, 50 Fed. Rep. 195.

Depositions for the defense in the Fry case were taken by the attorneys for the Singer Company; the models and other exhibits were procured by and at the expense of that company and its attorneys; the witnesses were examined by the attorneys of that company; and if the plaintiff had been successful that company was in a position to cause an appeal to be taken and would assuredly have done so.

The acts of alleged infringement charged to have been committed in the declaration in this case were *the precise acts* which were charged to be infringements in the Fry case. The manufacture and sale of the *same machines*, illustrated by the *same identical model*, through the *same identical agent*, and by the *same identical Singer Company*, were still the questions at issue.

The defendant in its answer in this case says: (record p. 43.)

"This defendant further avers that in said "action No. 11,808 the said Willis B. Fry was "made a defendant, because of acts of alleged "infringement committed by him in the usual "course of his employment by this defendant, "and within the scope of his said employment, "and not otherwise, and that all the acts which "were alleged in the declaration in said action "No. 11,808 to constitute infringement of "plaintiff's patent, were and are identical with "the acts which are in the declaration herein "alleged to have been the defendant's acts of in-"fringement. That this defendant by and "through its attorneys, openly assumed control "of the defense in said action No. 11,808, and "managed said defense at all stages thereof and "throughout the trial of said action, and until the "judgment therein became final, and defrayed "all the expenses of said defense."

The issue as to infringement in the Fry case was whether sewing-machines manufactured and sold by the Singer Company, and containing treadles made according to the Diehl letters patent No. 306,469, infringed the Cramer patent No. 271,426. *That is the precise and only issue of infringement in the present case.* In the Fry

case the Singer Company was the " real principal behind the formal party," and as such openly defended. The entire record of the Cramer litigation shows that the Singer Company was actively attacked and actively defended itself. That has always been as well known to every one in the litigation as it was well known that a sewing-machine was a sewing-machine.

It does seem to us that the law applicable to this state of facts is stated in *Maloy* v. *Duden*, 86, Fed. Rep. 404:

" To give full effect to the principle by which " parties are held bound by a judgment, and are " not permitted to re-examine the controversy " decided by it, not only those who are nominal " or formal parties are considered, but so are all " others who are identified in interest with either " of the immediate parties, and who actually par- " ticipate in conducting the controversy. The " real principal who is behind the formal party, " and is actually represented by him throughout " the controversy, is the real party, and in order " to invoke a judgment as an estoppel, for or " against him, it is always competent to show " what the real situation was, and what part in " promoting or defending the suit was actually " taken by him."

The "control of the litigation," which a participant therein must have in order to be bound by a judgment, is not such control as he must exercise *in his own name*, but he may exercise it by the use of "the name of the party to the record."

Miller v. *Tobacco Co.*, 7 Fed. Rep., 93.

It was perfectly well known to everybody that this was the position of the Singer Company in the Fry case.

This Court says: "Estoppels must be mutual. "If Cramer had obtained a judgment against "Fry in the former action, by what means could "he have enforced it against the Singer Manu-"facturing Company? How could he have "known, or, if he had suspected such to be the "case, how could he have proven that the corpor-"ation secretly aided the defense and paid the "expenses thereof?"

This question may be answered by the fact that plaintiff's counsel well knew that no judgment could be obtained against Fry, as the employe or agent of the Singer Company, that had any relation whatever to the plaintiff's purpose in prosecuting the suit. They were after the Singer Company as to certain questions relating to the validity of the patent and the charge of infringement, and the matter of damages or a money

judgment against Fry simply had nothing to do with those questions. Therefore damages were waived at the very opening of the trial. There cannot be a case found in the books where a money judgment for damages in any action at law or in any equity case has ever been obtained against a *mere agent or employee* who sells a patented device. There is no rule of damages applicable to such conditions and none has ever been formulated in any recorded case or enforced. The testimony is undisputed that the Singer Manufacturing Company itself manufactures and owns its sewing machines, and that no person buys, manufactures or owns them, or has the slightest title or interest in them, until they pass to the individual purchasers in all parts of the United States. Eighteen thousand employees aid and assist in this operation of the company, but they aid and assist as agents and employees only, in a greater or less degree as does the employee, Fry.

Supposing the Singer Manufacturing Company had filed a written statement as a part of the record of the Cramer-Fry litigation (if such a proceeding would have been permitted), stating in writing that the company was defending the suit;—what possible change of conditions or effects could such a paper have had in that litigation? As a matter of any known law or practice, there

was no judgment *for damages* that could have been entered against Fry, and not the slightest possibility of any embarrassment following as to the Singer Company by reason of any such *damage* judgment. The liability of the Singer Company, either as to damages or profits as a manufacturer and seller of sewing machines, is an entirely separate and independent question and matter that could not have been affected in anywise by any formal announcement and explanation of all the facts relating to the conduct by that Company of Fry's defense. The right of Cramer to have brought suit against the Singer Company for damages or profits upon the law and equity side of the court in the District of New Jersey would have been unaffected by any possible judgment *as to damages* in the Fry case

> *Birdsell* v. *Shaliol*, 112 U. S. 485.
>
> *Edison Co.* v. *Insurance Co.*, 60 Fed. Rep. 397.

In none of the cases cited does it appear that an agent or employee defendant was, as a matte of fact, defended by the real defendant manufacturer. If the counsel foı such defendant manufacturer appears in court, takes all of the testimony, and it is perfectly evident that the agent has no interest in the matter whatever, it goes without saying that the real party defendant is the

manufacturer in privity with the employee The court's interrogatory as to how the plaintiff, even if he had suspected, "could have proven that the corporation secretly aided the defense and paid the expenses thereof," is answered by the fact that there was nothing secret about it, and that the fact could have been proven at any time by the plaintiff by calling any of the witnesses, any of the model makers connected with defendant's testimony, any of defendant's counsel, and any officer or manager of the defendant corporation itself. It seems to us that the Court has made a radical mistake in not appreciating the fact that in patent causes a suit against a manufacturer's employee or agent, who is a mere salesman, is as a matter of fact a suit against the manufacturer himself.

The Singer Company Was Responsible to Fry for any Damages which Cramer could Recover from Him, without any Express Contract for Indemnity.

Our case does not come under the decisions cited by the Court of Appeals, *because there was privity between the Singer Company and Fry.* The mere fact that Fry was a salesman or em-

ployee of the Singer Manufacturing Company, and only sold their machines as such salesman and employee, makes it certain that as a matter of law as well as a matter of fact there was privity between the Singer Company and Fry. Can there be any doubt that any judgment that Cramer could have obtained against Fry as an employee of the Singer Company for damages could have been collected by Fry from the Singer Company? The Singer Company induced him to sell their machines, and directed him as to the kind of machines he should sell, and where he should sell them, and how he should sell them; and if he suffered any wrong or damage simply by reason of his acts as salesman, on account of the patented feature of the machines which he sold, there can be no question but that the Singer Company would have had to respond and satisfy such judgment, if sued by Fry. In other words, the act of the agent in this respect is the act of the principal, for which that principal is responsible.

The Civil Code of California, in which State Fry would have sued his principal, the Singer Company, for indemnification, if he had been mulcted in damages by Cramer, provides as follows:

"Sec. 2330. An agent represents his princi-
"pal for all purposes within the scope of his
"actual or ostensible authority, and all the rights

"*and liabilities* which would accrue to the agent
"from transactions within such limit, if they had
"been entered into on his own account, accrue
"to the principal."

That the Singer Company successfully demurred to the declaration in the Fry case on the ground that the court had no jurisdiction over it as a New Jersey corporation and not an inhabitant of the Northern District of California, left the said company then free to assume such a relation to the defense as might make it subject to the judgment *if it chose to do so.* In other words, the Singer Company, so far as concerned its capacity to assume such relations to the case as might thereafter estop it from questioning the judgment, *was in just exactly the position it would have been in if it had never been made a party to the action at all.* The dismissal, as to the said company "without prejudice," meant, of course, without prejudice to the commencement of an action in the district whereof it was an inhabitant, and which at that time had exclusive jurisdiction. But the fact that the district of New Jersey was held to be the district having jurisdiction did not prevent the company from assuming *voluntarily* such a relation to the action in a district whereof it was not

an inhabitant as might estop it from questioning the judgment in the case, whether there had been any attempt by the plaintiff to make it a party or not. The Singer Company may well have said:

"We will not be *compelled* to submit to this "jurisdiction; you have no right to compel us "by your process to defend in this district; we "may voluntarily defend this action and put our-"selves in such a position as to be bound by the "judgment; but that is for *us* to do *voluntarily* "and not for *you* to *compel*."

The Cited Cases Not in Point.

The decision of this Court reversing the Circuit Court turns upon the sole point that the defense of the Fry case by the Singer Company is not shown to have been openly made.

We respectfully urge that the facts as to the entire litigation, as disclosed by the records in the Fry case and in this case, show that Fry, whether as a party to the litigation or as a participant in its conduct, has never been considered by the plaintiff to be anything but a means through which to reach his principal, the Singer Company, and that no fact in the litigation was more

clearly apparent to all, or better known to the plaintiff (or indeed more desirable to the plaintiff), than that the defense was made by that company.

We have carefully examined the cases cited on pages 33 and 34 of the opening brief of plaintiff in error, and which are also cited by this Court in its decision, and we respectfully submit that they ought not to be held to conclude us in this case.

The quotation from Herman on estoppel brings our case clearly under the exception therein stated as quoted by the Court: "If one, "not a party of record, *nor in privity with a* "*party of record* to a judgment desires to avail "himself," etc. Of course, if privity exists in this case, it is clearly within instead of without the rule.

In *Andrews* v. *National Foundry & Pipe Works*, 76 Fed. Rep. 166, 172, the question was whether a judgment against a corporation would bind its stockholders *as such*, who were not parties, and in an action which did not arise out of a contract for subscription for stock. The Court says (173), referring to the stockholders against whom the former judgment was pleaded: "There "is no suggestion that they assumed the defense

" of the suit as one in which their own interests
" were in question, nor that the plaintiff in the
" action was led to believe that more was involved
" in the contest than a settlement of the issues
" joined between the parties of record." The
Court further said that " neither in the original
" bill, nor in the amendment thereto by which
" the lien decree was first mentioned, is the
" supposed estoppel alleged or the facts averred
" from which it could be deduced."

Our case is exactly the opposite—the Singer Company *did assume the defense of the suit.* The plaintiff *did know* that "more was involved in the contest" than a settlement of the issues between himself and Fry; and our pleadings here *do distinctly allege the estoppel.*

In *Lacroix* v. *Lyons*, 33 Fed. Rep. 438, the respondent was sued for selling cigarette papers improperly bearing complainant's trade-mark. Previously the respondent had sold to one Escobal cigarette papers bearing complainant's trade-mark, and the complainant had sued Escobal for using the mark, and Escobal had prevailed. The respondent in *Lacroix* v. *Lyons* entered a plea in abatement, setting up the Escobal judgment and averring privity between himself and Escobal, because the cigarette papers sold *by* Escobal had

been sold *to* Escobal by the respondent. The plea contained *no averment* that respondent Lyons was a party to the Escobal case, nor that he openly or otherwise defended the Escobal case, nor that his relations with Escobal were known to the complainant. This is all there is to the Lacroix case. The relations of the parties were entirely different from those in our case. The plea was adjudged to be insufficient. If it had contained such averments as are contained in the answer in our case, it would not have been overruled.

Allin's Heirs v. *Hall's Heirs*, 1 A. K. Marshall 435, was a Kentucky case of 1819, and was a contest over real property. It is the doctrine of that case that one may be identified in interest with a party to a suit, and may actually and openly participate in conducting the controversy at his own expense, and yet be not affected by the judgment. This is most certainly not the doctrine of *Maloy* v. *Duden*, *supra*, nor of the Federal cases there cited.

In the case of *Schroeder* v. *Lahrman*, the Court says in substance that if the relation of privity exists in a suit, the question as to whether a defense is made openly and to the knowledge of the other party is immaterial. In this case the court recognized the existence of a class of cases

which make subject to a judgment one who is not a party of record, but is virtually a party in interest, but held that it was doubtful if such cases had any application to the Schroeder case, *in view of the Minnesota statute.* The facts of the case were in every respect different from those in the case at bar, and the observations of the Court had special reference to the particular facts of the case.

The same may be said of *Cannon River Association* v. *Rogers*, 42 Minn., 123 In that case A had deposited money in a bank for B under special instructions regarding its payment, and had afterwards sued the bank for paying the money over to B in disregard of the instructions. The bank prevailed in the suit, and A subsequently sued B to recover the money. B pleaded in bar the former judgment, which had been in favor of the bank, on the ground that he himself had defended the suit for the bank. B was undoubtedly in wrongful possession of the money, and the alleged defense by himself of the suit against the bank did not appear to have been open or known to any one, and the relations of the parties were in no way similar to those of the parties in the case at bar.

We will not at this time attempt to reargue the case, but respectfully submit that the cases

cited against us on the question of *res judicata* are not in point; and that upon a rehearing and reconsideration of the case its facts will be found to bring it within the rule of *Maloy* v. *Duden* and other similar Federal cases.

Respectfully submitted,

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Attorneys for Petitioner.

We, the undersigned, attorneys for the petitioner, hereby certify that in our judgment the foregoing petition is well founded, and that it is not interposed for delay.

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